Supreme Court, U.S.
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No. 03-704

IN THE

Supreme Court of the United States

KAWASAKI MOTORS CORP., U.S.A.,

Petitioner,

v.

BOB SCHULTZ MOTORS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

By not addressing the merits of Kawasaki's petition, Schultz Motors implicitly concedes that the questions presented by Kawasaki are appropriate for this Court's consideration. Schultz Motors simply contends that this is not the right case for this Court to consider those questions. But its arguments in support of this contention are not well-founded.

A. This Case Presents The Same Issue As The Circuit Split.

Schultz Motors first tries to distinguish this case from the circuit split described in Kawasaki's petition. It contends that all of the cases involved in the circuit split concern pre-arbitration decisions by district courts. Since the District Court in this case allegedly erred in a post-arbitration decision, Schultz Motors contends that the issue here is different, making the case an inappropriate vehicle to resolve the split.

But the question presented here is whether the courts or an arbitrator should decide the enforceability of the terms of an arbitration argreement. The Eighth Circuit expressly decided this question with reference to Section 4 of the FAA using the same principles that it applies in pre-arbitration proceedings. App. A-7 – A-8.

The fact that the question arose after arbitration in this case is merely a function of Schultz Motors' delay in raising the issue. The applicable Eighth Circuit law would have been the same if Schultz Motors had raised the issue before arbitration.

B. Kawasaki Timely Objected to the Arbitrator's Action.

Schultz Motors next argues that certiorari is inappropriate because Kawasaki should have argued earlier

that the enforceability of arbitration terms is a question for the courts.

Schultz Motors' argument overlooks the fact that it gave no notice that it would be separately challenging the enforceability of the fee-shifting term until the hearing on the amount of fees. Before that, both parties had made all of their enforceability arguments to the District Court before the arbitration. When Schultz Motors first raised the enforceability issue with the Arbitrator, Kawasaki properly objected that enforceability had already been decided by the District Court. App. A-33.

Kawasaki thus made its objection as soon as Schultz Motors raised the enforceability of the fee-shifting term and the objection was timely.

C. Kawasaki Did Not Consent to Arbitrate the Fee-Shifting Provision's Enforceability.

Schultz Motors contends that Kawasaki consented to arbitrate the enforceability of the fee-shifting term by not "asking the district court to clarify whether the fee issue was properly before the arbitrator." Brief in Opp. 16.

Schultz Motors cites *Franklin Electric Co. v. International Union, UAW*, 886 F.2d 188, 191 (8th Cir. 1989). In *Franklin*, however, the resisting party argued the substance of the arbitrability question to the arbitrator. The court considered this substantive argument to be an implied consent to arbitrate that question. In this case, Kawasaki asserted that the issue of enforceability already had been decided and did not argue the merits of the issue to the Arbitrator. Thus, the dispositive fact in *Franklin* is not present here.

Moreover, the implied consent principle applied in *Franklin* has been superseded by this Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Consent to arbitrate an arbitrability question now requires

clear and unmistakable evidence. *See id.* at 939 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and umistakeabl[e]' evidence that they did so.") (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). Schultz Motors has made no argument that the *First Options* standard was met here.

D. The Relief Kawasaki Sought Is Permitted Under the FAA.

Schultz Motors suggests that an arbitration award cannot be vacated in part, and thus the Eighth Circuit was correct to affirm regardless of the resolution of the circuit split. This suggestion is incorrect. There is nothing in FAA Section 10 that requires the courts to vacate all of an award when there are independent portions of the award that should be confirmed.

In *Centralab, Inc. v. Local No. 816*, 827 F.2d 1210, 1217 (8th Cir. 1987), for example, the Eighth Circuit affirmed the district court's decision upholding an arbitrator's award on liability but vacating that award with respect to damages and remedies. *See also Lummus Global Amazonas, S.A. v. Aguaytia Energy Del Peru*, 256 F.Supp.2d 594, 600 (S.D. Tex. 2002); *Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co.*, 990 F.Supp. 304, 311 (S.D.N.Y. 1998).

In an early decision by Chief Justice Marshall, this Court ruled that arbitration awards may be voided in part. *Lyle v. Rodgers*, 18 U.S. (5 Wheat.) 394, 409 (1820) ("That an award may be void in part, and good for the residue, will be readily admitted; but if that part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void."); *accord Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498-99 (1931) (discussing when it is appropriate to vacate a judgment in part). There is nothing in the FAA that changed this principle.

The cases that Schultz Motors cites do not support a contrary conclusion. *UHC Management Co., Inc. v. Computer Sciences Corp.*, 148 F.3d 992, 999 (8th Cir. 1998), involved a request to modify and then confirm an arbitration award. The court merely stated that it could not do so without proof that the requirements of FAA Section 11 were met. This unremarkable holding might be stretched to weakly imply that Section 10 cannot be used to partially vacate an arbitration award. But that certainly is not the holding of the case.

Schultz Motors also quotes *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 721 (8th Cir. 1999). But in that case the Eighth Circuit did not reach the issue of whether a court could vacate in part: "[W]e make no finding at this time as to whether the district court was correct [in vacating in part and remanding in part]. Under the conditions of this appeal, we need not reach the question...." *Id.* Instead, the court found that the arbitrator had expressly intended that the arbitration award be indivisible and found that, on those specific facts, the court could not vacate in part. *Id.* In contrast, in the present case, the Arbitrator never stated that he intended his two separate awards to be indivisible but instead bifurcated the proceedings and issued two separate, distinct awards.

Schultz Motors' position is further undercut by the fact that every federal court to consider the question of whether the liability phase of a bifurcated arbitration proceeding can be challenged by vacation or modification has held in the affirmative. *See Hart Surgical, Inc. v. UltraCision, Inc.*, 244 F.3d 231, 235 (1st Cir. 2001) (where the liability and damages portion of an arbitration are bifurcated, holding "the liability determination is final and subject to district court review"); *Trade & Transport, Inc. v. Natural Petroleum Charterers, Inc.*, 931 F.2d 191, 195 (2d Cir. 1991) (stating that arbitrator's determination of bifurcated liability issue is final award, and its authority over that issue is ended);

McGregor Van De Moere, Inc. v. Paychex, Inc., 927 F.Supp. 616, 618 (W.D.N.Y. 1996) (finding, where arbitrator decides every liability issue in a bifurcated proceeding, the order is final for the purposes of review under the FAA). If a court can review only one of two bifurcated awards then a court must be able to vacate only one of two bifurcated awards.

Moreover, the courts' authority to vacate arbitration awards is phrased in substantially the same terms as their authority to vacate judgments. *Compare* 28 U.S.C. §2106 *with* 9 U.S.C. § 10. The courts certainly vacate judgments in part. *See, e.g., City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). They should have a similar authority to vacate arbitration awards in part, assuming that the standards of Section 10 are satisfied.

Finally, regardless of whether an arbitration award may be vacated in part under Section 10, it certainly may be modified in part under Section 11. Since Kawasaki also challenged the Arbitrator's decision under Section 11, there is no basis for denying certiorari upon the premise that the FAA does not authorize the relief that Kawasaki seeks.

E. Conclusion

For the reasons given in the petition and this reply, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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